

CRIMINAL YEAR SEMINAR

April 19, 2019 - Tucson, Arizona
April 26, 2019 - Phoenix, Arizona
May 3, 2019 - Chandler, Arizona



CRIMINAL CODE UPDATE

Presented By:

The Honorable Michael McVey

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Distributed By:

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**2019 APAAC CRIMINAL YEAR IN
REVIEW:
THE ARIZONA CRIMINAL CODE**

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13-105. DEFINITIONS

In this title, unless the context otherwise requires:

13. "Dangerous offense" means an offense involving the discharge, use or threatening exhibition of a deadly weapon or dangerous instrument or the intentional or knowing infliction of serious physical injury on another person.

...

30. "Person" means a human being and, as the context requires, an enterprise, a public or private corporation, an unincorporated association, a partnership, a firm, a society, a government, a governmental authority or an individual or entity capable of holding a legal or beneficial interest in property.

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**STATE EX REL. MONTGOMERY V. BRAIN
(HU), 244 ARIZ. 525 (APP. 2018)**

Issue:
May the State allege a crime is dangerous, where the deadly weapon or dangerous instrument is employed against an animal, and not against a person?




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13-404. JUSTIFICATION; SELF-DEFENSE

A. Except as provided in subsection B of this section, a person is **justified** in threatening or using physical force against another when and to the extent a reasonable person would believe that physical force is immediately necessary to protect himself against the other's use or attempted use of unlawful physical force.

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STATE V. CARSON, 243 ARIZ. 463 (2018)

Issue:

Is a defendant entitled to a self-defense instruction, even where he asserts misidentification, a defense inconsistent with self-defense?



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13-417. NECESSITY DEFENSE

A. Conduct that would otherwise constitute an offense is justified if a reasonable person was compelled to engage in the proscribed conduct and the person had **no reasonable alternative to avoid imminent public or private injury** greater than the injury that might reasonably result from the person's own conduct.

B. An accused person may not assert the defense under subsection A if the person intentionally, knowingly or recklessly placed himself in the situation in which it was probable that the person would have to engage in the proscribed conduct.

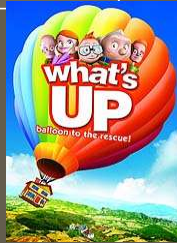
C. An accused person may not assert the defense under subsection A for offenses involving homicide or serious physical injury.

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STATE V. MEDINA, 244 ARIZ. 361 (APP. 2018)**Issue:**

When is a defendant entitled to a necessity defense?

"Imminence is at the heart of the defense of necessity—without it, a necessity does not exist."



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STATE V. MEDINA OBSERVATIONS

- pretrial preclusion of a defense for disclosure violation should come with:
- T/C's consideration of *Smith* factors (i.e., prejudice? Continuance appropriate? Any other less drastic sanctions?)
- offer of proof and discussion why Δ is or is not entitled to the defense ("slightest evidence" standard—on appeal, this will later be viewed in light most favorable to Δ if defense is precluded)



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13-703. REPETITIVE OFFENDERS: SENTENCING

N. The penalties prescribed by this section shall be substituted for the penalties otherwise authorized by law if an allegation of prior conviction is charged in the indictment or information and admitted or found by the court. **The release provisions prescribed by this section shall not be substituted for any penalties required by the substantive offense or a provision of law that specifies a later release or completion of the sentence imposed before release.**

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13-3407. POSSESSION, USE, ADMINISTRATION, ACQUISITION, SALE, MANUFACTURE OR TRANSPORTATION OF DANGEROUS DRUGS; CLASSIFICATION

F.A person who is convicted of a violation of subsection A, paragraph 4 of this section or subsection A, paragraph 2, 3 or 7 of this section involving methamphetamine **is not eligible for suspension of sentence, probation, pardon or release from confinement on any basis** until the person has served the sentence imposed by the court, the person is eligible for release pursuant to section 41-1604.07 or the sentence is commuted.

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STATE V. SCALPH, 245 ARIZ. 177 (APP. 2018)

Issue:

Under what circumstances may a trial court impose a flat-time prison sentence?



Reminder: Check substantive and general sentencing statutes – both may apply



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13-3212. CHILD SEX TRAFFICKING; CLASSIFICATION; INCREASED PUNISHMENT; DEFINITION

A. A person commits child sex trafficking by knowingly:

1. Causing any minor to engage in prostitution.
2. Using any minor for the purposes of prostitution.



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9. Enticing, recruiting, harboring, providing, transporting, making available to another or otherwise obtaining a minor with the intent to cause the minor to engage in prostitution or any sexually explicit performance.

10. Enticing, recruiting, harboring, providing, transporting, making available to another or otherwise obtaining a minor with the knowledge that the minor will engage in prostitution or any sexually explicit performance.

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B. A person who is at least eighteen years of age commits child sex trafficking by knowingly:

1. Engaging in prostitution with a minor who is under fifteen years of age.

C. It is **not a defense** to a prosecution under subsection A and subsection B, paragraphs 1 and 2 of this section that the other person is a peace officer posing as a minor or a person assisting a peace officer posing as a minor.

E. Child sex trafficking pursuant to subsection A of this section is a class 2 felony if the minor is under fifteen years of age and **is punishable pursuant to section 13-705.**

F. Child sex trafficking pursuant to subsection B, paragraph 1 of this section is a class 2 felony and **is punishable pursuant to section 13-705.**

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13-705. DANGEROUS CRIMES AGAINST CHILDREN: SENTENCES; DEFINITIONS

• C. Except as otherwise provided in this section, a person who is at least eighteen years of age or who has been tried as an adult and who is convicted of a dangerous crime against children in the first degree involving attempted first degree murder of a minor who is twelve, thirteen or fourteen years of age, second degree murder of a minor who is twelve, thirteen or fourteen years of age, sexual assault of a minor who is twelve, thirteen or fourteen years of age, taking a child for the purpose of prostitution, **child sex trafficking**, sexual conduct with a minor who is twelve, thirteen or fourteen years of age, continuous sexual abuse of a child or manufacturing methamphetamine under circumstances that cause physical injury to a minor who is twelve, thirteen or fourteen years of age or involving or using minors in drug offenses **shall** be sentenced to a term of imprisonment as follows:



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- Minimum
- Presumptive Maximum

- 13 years
- 20 years
- 27 years

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STATE V. LANTZ, 245 ARIZ. 451 (APP. 2018) PETITION FOR REVIEW TO THE ARIZONA SUPREME COURT FILED DECEMBER 12, 2018, AND CONTINUED ON APRIL 5, 2019; REVIEW STILL PENDING.

Issue:
May a trial court **designate** a conviction for child sex trafficking a Dangerous Crime Against Children, where the “child victim” is not a minor, but an undercover police officer? May the Court sentence the defendant to a sentence within the ranges of *ARS § 13-705*, the enhanced sentence statute for dangerous crimes against children?

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13-1202. THREATENING OR
INTIMIDATING: CLASSIFICATION

A. A person commits threatening or intimidating if the person threatens or intimidates by word or conduct:

1. To cause physical injury to another person or serious damage to the property of another; or

B. Threatening or intimidating pursuant to subsection A, paragraph 1 or 2 is a class 1 misdemeanor, **except that it is a class 6 felony if:**

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- I. The offense is committed in retaliation for a victim's either reporting criminal activity or being involved in an organization, other than a law enforcement agency, that is established for the purpose of reporting or preventing criminal activity.

2.The person is a criminal street gang member.



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STATE V. MEEDS, 244 ARIZ. 454 (APP. 2018) PETITION FOR REVIEW TO THE ARIZONA SUPREME COURT DENIED APRIL 5, 2019.

Issues:

- Is ARS §13-1202(B)(2) unconstitutionally vague?
- Is ARS §13-1202(B)(2) facially overbroad because it deters protected speech?
- Does ARS § 13-1202(B)(2) violate the First Amendment right of association?

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13-1203. ASSAULT: CLASSIFICATION

A. A person commits assault by:

- I. Intentionally, knowingly or recklessly causing any physical injury to another person; or

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**13-1204. AGGRAVATED ASSAULT;
CLASSIFICATION; DEFINITIONS**

A person commits aggravated assault if the person commits assault as prescribed by section 13-1203 under any of the following circumstances:



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- 4. If the person commits the assault while the victim is bound or otherwise physically restrained or **while the victim's capacity to resist is substantially impaired.**
- 5. If the person commits the assault after entering the private home of another with the intent to commit the assault.

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STATE V. DUARTE, 805 ARIZ. ADV. REP. 5 (APP. 2018)
PETITION FOR REVIEW TO THE ARIZONA SUPREME COURT
FILED JANUARY 30, 2019; REVIEW STILL PENDING.

Issue:

Is a victim's capacity to resist substantially impaired if they are asleep at the onset of an assault, thus making what would otherwise be a simple assault, a class 6 felony under ARS §13-1204(A)(4)?

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13-1301. DEFINITIONS

In this chapter, unless the context otherwise requires:

2. "Restrain" means to restrict a person's movements without consent, without legal authority, and in a manner which interferes substantially with such person's liberty, by either moving such person from one place to another or by confining such person.

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13-1304. KIDNAPPING: CLASSIFICATION; CONSECUTIVE SENTENCE

A. A person commits kidnapping by knowingly restraining another person with the intent to:

3. Inflict death, physical injury or a sexual offense on the victim, or to otherwise aid in the commission of a felony.

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STATE V. DUTRA, 245 ARIZ. 180 (APP. 2018)

Issue:

What constitutes substantial interference with a victim's liberty for purposes of Arizona's kidnapping statute?



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STATE V. DUTRA

- “We address in this case a kidnapping conviction based on a restraint of no more than 30 seconds and compelled movement of a mere five steps. Based on the broad language of the statute and case authorities construing it, we affirm.”



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13-1802. THEFT: CLASSIFICATION; DEFINITIONS

A. A person commits theft if, without lawful authority, the person knowingly:

1. Controls property of another with the **intent to deprive** the other person of such property; or ...
3. Obtains services or property of another by means of any material misrepresentation with intent to deprive the other person of such property or services; or ...
5. Controls property of another knowing or having reason to know that the property was stolen.

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13-1814. THEFT OF MEANS OF TRANSPORTATION; AFFIDAVIT; CLASSIFICATION

- A. A person commits theft of means of transportation if, without lawful authority, the person knowingly does one of the following:
- 1. Controls another person's means of transportation with the **intent to permanently deprive** the person of the means of transportation. ...
- 3. Obtains another person's means of transportation by means of any material misrepresentation with intent to permanently deprive the person of the means of transportation....
- 5. Controls another person's means of transportation knowing or having reason to know that the property is stolen.

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13-1902. ROBBERY: CLASSIFICATION

- A. A person commits robbery if in the course of taking any property of another from his person or immediate presence and against his will, such person threatens or uses force against any person **with intent either to coerce surrender of property or to prevent resistance to such person taking or retaining property.**

State v. Carter, 245 Ariz. 382 (App. 2018)

Issue:

What are the lesser-included offenses of theft, theft of means, and robbery?

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STATE V. CARTER: BLOCKBURGER TEST OR SPOT THE DIFFERENCE GAME?

Theft



Vehicle Theft

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STATE V. CARTER

What are the lesser-included offenses of theft, theft of means, and robbery?
Compare statutory elements

CARJACKED SUV	BURGLARIZED HOME AND BARN	STOLE TRACTOR
Aggravated assault	Burglary x 2	Burglary
Burglary	theft	Vehicle theft
Criminal damage		Theft (lesser of vehicle theft)
Vehicle theft		
Theft (lesser of vehicle theft)		
Robbery		

NOTE: COA's conclusion re: robbery conflicts with prior holding in *State v. Garcia* (which held theft is lesser-included offense of armed robbery)

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FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION (DOUBLE JEOPARDY CLAUSE)

"No person shall ... be subject for the same offense to be twice put in jeopardy of life or limb."

Protects against multiple punishments for same offense (*Carter*) and subsequent prosecution for the same offense after conviction or acquittal (issue presented in *Martin*)

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Unable to agree



STATE V. MARTIN, 245 ARIZ. 42
(APP. 2018) (AZSC GRANTED
REVIEW)

- Does double jeopardy bar retrial of a greater offense on which a jury was unable to agree after the defendant's successful appeal of his conviction on the lesser-included offense?

DOUBLE JEOPARDY!

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I 3-2505. PROMOTING PRISON CONTRABAND; EXCEPTIONS: X-RADIATION; BODY SCANS; CLASSIFICATION

- A. A person, not otherwise authorized by law, commits promoting prison contraband:
 - 1. By **knowingly taking contraband into a correctional facility** or the grounds of a correctional facility; or
 - 3. By **knowingly making, obtaining or possessing contraband while being confined in a correctional facility** or while being lawfully transported or moved incident to correctional facility confinement.

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13-2501. DEFINITIONS

In this chapter, unless the context otherwise requires:

1. "Contraband" means any dangerous drug, narcotic drug, marijuana, intoxicating liquor of any kind, deadly weapon, dangerous instrument, explosive, **wireless communication device**, multimedia storage device or other article whose use or possession would endanger the safety, security or preservation of order in a correctional facility or a juvenile secure care facility as defined in section 41-2801, or of any person within a correctional or juvenile secure care facility.

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13-202. CONSTRUCTION OF STATUTES WITH RESPECT TO CULPABILITY

- A. If a statute defining an offense prescribes a culpable mental state that is sufficient for commission of the offense without distinguishing among the elements of such offense, the prescribed mental state shall apply to each such element unless a contrary legislative purpose plainly appears.

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13-105. DEFINITIONS

In this title, unless the context otherwise requires:

- (b) "Knowingly" means, with respect to conduct or to a circumstance described by a statute defining an offense, that a person is aware or believes that the person's conduct is of that nature or that the circumstance exists. **It does not require any knowledge of the unlawfulness of the act or omission.**

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STATE V. FRANCIS, 243 ARIZ. 434 (2018)
ISSUE:



Is the State required to prove that defendant knew that possession of a cell phone was contraband within the meaning of ARS §13-2501(A)(1), or must it prove only that he knowingly possessed a cellphone within a correctional facility?

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**13-2508. RESISTING ARREST;
CLASSIFICATION; DEFINITION**

- A. A person commits resisting arrest by intentionally preventing or attempting to prevent a person reasonably known to him to be a peace officer, acting under color of such peace officer's official authority, from effecting an arrest by:
 - 1. **Using or threatening to use physical force** against the peace officer or another.
 - 2. Using any other means creating a substantial risk of causing physical injury to the peace officer or another.
 - 3. Engaging in **passive resistance**.
- B. Resisting arrest pursuant to subsection A, paragraph 1 or 2 of this section is a class 6 felony. Resisting arrest pursuant to subsection A, paragraph 3 of this section is a class 1 misdemeanor.
- C. For the purposes of this section, "passive resistance" means a nonviolent physical act or failure to act that is intended to impede, hinder or delay the effecting of an arrest.

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STATE V. MATTHEWS, 245 ARIZ. 281 (APP. 2018)

- Is misdemeanor resisting-arrest ("engaging in passive resistance") a lesser-included offense of felony resisting-arrest?
- *Blockburger* test – are these the "same offenses" for DJ purposes?

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13-2508. RESISTING ARREST &
STATE V. MATTHEWS

(A)(1): **Using or threatening to use physical force** against the peace officer or another.

(3) Engaging in **passive resistance**.

(C) For the purposes of this section, "passive resistance" means a **nonviolent physical act** or failure to act that is intended to impede, hinder or delay the effecting of an arrest.

COA: "Using or threatening force is not nonviolent," (i.e., different elements, not the "same" offense; no DJ problem)



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13-2810. INTERFERING WITH JUDICIAL PROCEEDINGS;
CLASSIFICATION

- A. A person commits interfering with judicial proceedings if such person knowingly:
 - 1. Engages in disorderly, disrespectful or insolent behavior during the session of a court which directly tends to interrupt its proceedings or impairs the respect due to its authority; or
 - 2. Disobeys or resists **the lawful order, process or other mandate of a court;**

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STATE V. VAKHARWALA, 244 ARIZ. 201 (APP. 2018)
ISSUE:



- Does an Arizona Court which has issued an Order of Protection pursuant to ARS §13-3602, have subject matter jurisdiction to enforce a violation of the order pursuant to ARS §13-2810, where the alleged violation occurred when neither party was in Arizona?

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13-3211. DEFINITIONS

In this chapter, unless the context otherwise requires:

- 5. "Prostitution" means engaging in or agreeing or offering to engage in sexual conduct under a fee arrangement with any person for money or any other valuable consideration.

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13-3212. CHILD SEX TRAFFICKING: CLASSIFICATION;
INCREASED PUNISHMENT: DEFINITION

- B. A person who is at least eighteen years of age commits child sex trafficking by knowingly...
- 2. Engaging in prostitution with a minor who the person knows or should have known is fifteen, sixteen or seventeen years of age.

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STATE V. BURGESS, 245 ARIZ. 275 (APP. 2018)
ISSUE:

Case	Date	Case Name	Case Number	Case Status	Case Type	Case Description	Case Outcome	Case Notes
13-3212	06/25/2018	State v. Burgess	245 ARIZ. 275	Appellate	Child Sex Trafficking	Is child-sex-trafficking a completed offense when a defendant agrees over the phone to meet underage girls and agrees to pay for their services, even before he meets them in person?		

- Is child-sex-trafficking a completed offense when a defendant agrees over the phone to meet underage girls and agrees to pay for their services, even before he meets them in person?

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[illegible]

- 50

- A person who has been convicted of or adjudicated guilty except insane for a violation or attempted violation of any of the following offenses or who has been convicted of or adjudicated guilty except insane or not guilty by reason of insanity for an offense committed in another jurisdiction that if committed in this state would be a violation or attempted violation of any of the following offenses or an offense that was in effect before September 1, 1978 and that, if committed on or after September 1, 1978, has the same elements of an offense listed in this section or who is required to register by the convicting or adjudicating jurisdiction, within ten days after the conviction or adjudication or within ten days after entering and remaining in any county of this state, shall register with the sheriff of that county:
- 3. Sexual abuse pursuant to section 13-1404 if the victim is under eighteen years of age.

- 51

13-4401. DEFINITIONS

In this chapter, unless the context otherwise requires:

- 19. "Victim" means a person against whom the criminal offense has been committed, including a minor; or if the person is killed or incapacitated, the person's spouse, parent, child, grandparent or sibling, any other person related to the person by consanguinity or affinity to the second degree **or** any other lawful representative of the person, except if the person or the person's spouse, parent, child, grandparent, sibling, other person related to the person by consanguinity or affinity to the second degree or other lawful representative is in custody for an offense or is the accused.

52

E.H. V. SLAYTON (CONLEE), 245 ARIZ. 331 (APP. 2018)

- Issue: May a trial court grant victim status to *each* person who fits within any of the defined categories of victims under ARS § 13-4401(19), when the person against whom the crime was committed is deceased or incapacitated?



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STATE V. MAESTAS, 244 ARIZ. 9 (2018)



Issue: Whether the Legislature's criminalization of the possession of medical marijuana on public university campuses, which modifies the Arizona Medical Marijuana Act, violates the Voter Protection Act.



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**15-108. MEDICAL MARIJUANA; SCHOOL CAMPUSES;
PROHIBITION; DEFINITION**

- A. In addition to the limitations prescribed in section 36-2802, subsection B, a person, including a cardholder as defined in section 36-2801, may not lawfully possess or use marijuana on the campus of any public university, college, community college or postsecondary educational institution.

**HELD: This statute violates
the Voter Protection Act**



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**36-2804.03. ISSUANCE OF REGISTRY
IDENTIFICATION CARDS**

- A. Except as provided in subsection B and in section 36-2804.05, the department shall:
- ...
- 2. Issue a registry identification card to a qualifying patient and his designated caregiver, if any, within five days of approving the application or renewal. A designated caregiver must have a registry identification card for each of his qualifying patients.

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**STATE V. KEMMISH, 244 ARIZ. 314
(APP. 2018)
ISSUE:**

- Is a physician's recommendation letter issued pursuant to California's Compassionate Use Act equivalent to a registry identification card issued to an Arizona resident under Arizona's Medical Marijuana Act?

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36-281 I. PRESUMPTION OF MEDICAL USE OF MARIJUANA: PROTECTIONS: CIVIL PENALTY

- B.A registered qualifying patient or registered designated caregiver is not subject to arrest, prosecution or penalty in any manner, or denial of any right or privilege, including any civil penalty or disciplinary action by a court or occupational or professional licensing board or bureau:
- 1. For the registered qualifying patient's medical use of marijuana pursuant to this chapter, if the registered qualifying patient does not possess more than the allowable amount of marijuana.

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STATE V. JONES, 245 ARIZ. 46 (APP. 2018), REVIEW GRANTED

Issue: Does AMMA provide immunity from prosecution for the possession of hashish?

What Is The Difference Between Hashish And Marijuana?



"Faces" Of Marijuana



THC Levels



Mind-Altering Effects

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STATE V. JONES, 245 ARIZ. 46 (APP. 2018)


2-1 opinion in COA

Majority: "AMMA is silent as to hashish. Prior understanding [of the definitions of cannabis and marijuana] strongly indicates that AMMA in no way immunizes the possession or use of hashish."

Dissent: AMMA's definition of marijuana "clearly encompasses all forms of the marijuana plant, including its resin," and therefore, voters intended to include hashish within the scope of substances protected by the AMMA.



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ISSUE PRECLUSION

Common law doctrine of issue preclusion applies when:

- 1. A fact was litigated in a previous suit;
- 2. A final judgment was entered;
- 3. The party against whom the doctrine is to be invoked had a full opportunity to litigate the matter and actually did litigate it;
- 4. The fact was essential to the prior judgment;
- 5. There is a mutuality of parties.

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CROSBY-GARBOTZ V. FELL IN AND FOR COUNTY OF PIMA, 246 ARIZ. 54 (2019)

Issue: May issue preclusion apply in a criminal proceeding where an issue of fact was previously adjudicated in a dependency proceeding and the other elements of preclusion are met?

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